FILED
OCT 19 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 483

WEIRTON STEEL COMPANY,
Petitioner,

vs.

COSTANZO COAL MINING COMPANY,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Facts Present Questions Different from Those Asserted by Petitioner

This case was submitted in the District Court on an agreed statement of facts and no other evidence. The controlling facts are stated and analyzed in the opinion of the Circuit Court of Appeals (R., pp. 58-71).

There is no justification in the record for the statements made in the Petitioner's petition, (page 6) and in Petitioner's brief, (pages 12, 16 and 21) depicting the Petitioner as an imposed on innocent, coaxed into a contract by Respondent's willful misrepresentations of the law. The record shows (R., pp. 27-31) that both the Petitioner and the Respondent thought the contract between them was a

renewal of the written contract dated March 20, 1933; that no assurances that the contract did not come under the Bituminous Coal Act of 1937 were given to the Petitioner by the Respondent prior to the date of the contract involved which was effected by the exchange of letters written February 27, 1940, and February 29, 1940 (R., p. 37) and that the Petitioner and the Respondent first discussed the applicability of the Bituminous Coal Act to their contractual relationship by letters written during March, 1941 (R., pp. 52-56), when the contract was more than a year old, after all but about 13,000 of the 150,430.8 tons of coal involved had been delivered and very shortly after the attorney for the Bituminous Coal Division had expressed doubt as to the contract between the Petitioner and the Respondent being a pre-code contract.

The nearest these letters get to an assurance is the statement in the letter written March 11, 1941 to the effect that Respondent's lawyer *can* see no reason why the Bituminous Coal Division *should not* exempt the contract (R., p. 55) and the statement in the March 6th letter that pre-code contracts are exempt (R., p. 52).

The record does not show that the agreement dated March 20, 1933, was entered into pursuant to the agency agreements set out on pages 33-36 of the Transcript of Record, as is claimed in the Petitioner's petition (page 4), but on the contrary affirmatively shows that this could not have been the fact, for the reason that the agreement with Cove Hill Coal Company (R., p. 33) was executed January 2, 1940, and the Wheeling Valley Coal Corporation agreement (R., p. 35) was executed June 1, 1933, both thus post-dating the March 20, 1933, agreement.

The question presented therefore is not whether the respondent may repudiate a fully executed contract against an innocent party who relied on representations falsely

made, but, rather, whether a manufacturing concern, located in the heart of the bituminous coal district and having every opportunity to know what the law is, can obtain great quantities of coal for about half the price fixed by the government, avoid payment by evoking the in pari delicto rule and by so doing nullify a law that was enacted for the sole purpose of maintaining uniform prices and thereby stabilizing the bituminous coal industry.

The Circuit Court of Appeals announced no new law when it held that the in pari delicto rule does not apply in this case.

Right of Seller to Recover Difference Between Minimum Price and What He Received for Coal Exists as Certainly as Right of Carrier to Recover Difference Between Contract Rates and Interstate Commerce Commission Tariffs.

The right of a seller of coal to recover from the buyer the difference between the minimum prices fixed under the code and the amounts paid by the buyer exists as certainly as the right of a carrier to recover the difference between the prices stipulated in a shipping contract and the tariff fixed by the Interstate Commerce Commission, or as the right of a stockyards company to recover from a user of its stockyards charges fixed by the Secretary of Agriculture under the Packers and Stockyards Act.

None of these acts specifically imposes on the carrier, or the packing company or the seller of coal the duty of bringing suit. The tariffs and price schedules under all are fixed by administrative bodies.

The Bituminous Coal Act was enacted for the purpose of stabilizing the coal industry, primarily through price fixing and the elimination of unfair competition.

Sunshine Anthracite Coal Company v. *Adkins*, 310 U. S. 381, 84 L. Ed. 1263, 1268.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities.

Interstate Commerce Commission v. *B. & O. R. R. Co.*, 145 U. S. 265, 36 L. Ed. 699.

One of the leading cases involving the right of the carrier to recover the difference between the freight rate quoted a shipper and the rate established by the Interstate Commerce Commission is *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company* v. *Fink*, 250 U. S. 577, 67 L. Ed. 1151. The pertinent parts of the act construed in the *Fink* case and those in the Bituminous Coal Act are set out below in parallel columns:

Interstate Commerce Act	Bituminous Coal Act
"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any ship-	"No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the commission, and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code; Provided, that the provisions of this paragraph shall not apply to a lawful and bona fide written contract entered into prior to June 16, 1933.

Interstate Commerce Act

per or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

(Act of June 29, 1906, 34 Stat. at L., 587, Chap. 3591, Comp. Stat., Section 8597.)

Bituminous Coal Act

The making of a contract for the sale of coal at a price below the minimum or above the maximum therefor established by the commission at the time of the making of the contract shall constitute a violation of the code, and such contract shall be invalid and unenforceable.

From and after April 26, 1937, until prices shall have been established pursuant to Subsections (a) and (b) of this section, no contract for the sale of coal shall be made providing for delivery for a period longer than thirty days from the date of the contract.

No contract shall be made for the sale of coal for delivery after the expiration date of this subchapter at a price below the minimum or above the maximum therefor established and in effect at the time of making the contract."

(Volume 15, U. S. C. A., page 833.) See also 49 U. S. C. A., Sections 3 and 3(1).

Both the Interstate Commerce Act and the Bituminous Coal Act were passed for the benefit of the public. The object of each was to create uniformity in charges and to create stability where stability had not theretofore existed. If the Interstate Commerce Act gives the carrier the right

to maintain actions to recover what the Interstate Commerce Commission has said are proper charges under the act, then just as surely the Bituminous Coal Act of 1937 gives the right to the seller to recover the prices which the Department of the Interior has established under the Bituminous Coal Act.

The courts have uniformly held that railroad companies can recover the difference between the rate quoted a shipper and the rate established by the Interstate Commerce Commission.

Louisville & Nashville Railroad Company v. *Central Iron & Coal Co.*, 265 U. S. 59, 68 L. Ed. page 900, from the syllabus:

> 1. "A carrier cannot reduce the amount legally payable for transportation of freight in an interstate shipment, or release the liability of the shipper, who has assumed an obligation to pay the charges."
>
> 2. "No act or omission of a carrier, except in permitting the running of the statute of limitations, can estop or preclude it from enforcing payment of the full amount due for transportation of freight by a person liable therefor."

It has been repeatedly held that the carrier is not estopped from maintaining an action against the shipper even where there is collusion between the carrier and the shipper.

Louisville & N. R. Co. v. *Williamson*, 87 Fed. (2d) 34.

A. T. & S. F. Ry. Co. v. *Judson*, 49 Fed. Supp., page 789.

Kurn et al. v. *Pittsburgh Plate Glass Co*, 48 Fed. Supp. 574.

Fort Worth & D. C. Ry. Co. v. *Burkhart Mfg. Co.*, 56 Fed. Supp. 159.

In Pari Delicto Rule Does Not Apply in This Case Because Public Interest Is Involved

Previous to the time the government undertook to regulate the coal industry, it had been almost ruined by keen competition and over-production. Prices had been driven to such a low level that mines could not be operated at a profit, men were out of work and those who worked could not make a living wage. Stabilization was imperative to correct these conditions not only to preserve the coal industry, but also because it was in the public interest that the coal industry be preserved.

The public interest is served in the same degree by suits brought to uphold the coal prices of the Department of the Interior as it is served by suits brought to uphold the tariffs established by the Interstate Commerce Commission. Both classes of actions are brought in the public interest, and because such actions are in the public interest the rule of estoppel does not apply.

The following is taken from the note in 83 A. L. R., page 258:

> "It has been held that a carrier can no more estop itself to collect the full freight rate through a mistake than it could bind itself by contract to collect other than the lawful rate. Bush v. Keystone Driller Co. (1917), 199 Mo. App. 152, 199 S. W. 597.
>
> In Great Northern R. Co. v. Hyder (1922; D. C.), 279 Fed. 783, the court, in answering the contention that the mistake made by a carrier in delivering the shipment to the consignee without requiring payment of the freight charges by the consignor precluded recovery from the consignee, said: 'The railroad, suing in its interest alone, might be estopped; but in suing under the statute, it is suing as a trustee for the protection of the public. The public, in whose interest, as well as its own, the carrier has a lien on the undelivered freight for the full rate, is not estopped,

because it did no act and made no representation on which the consignee relied, and when the consignee accepted the goods, it deprived the public of that lien. It follows that the consignee, because of such act, still remains liable to the carrier, who sues in the public's interest, for the value of the right destroyed.'

With further reference to this point, it was stated in New York, N. H. & H. R. Co. v. York & W. Co. (1913), 215 Mass. 36, 102 N. E., 366 (writ of error dismissed in (1915) 239 U. S. 631, 60 L. Ed. 488, 36 S. Ct. 166): 'Estoppel against the collection of a rate fixed by rigid law cannot be predicated upon a statement or representation which at most can be of no higher binding force than an express contract to the same effect honestly made by both parties would be. Such a contract would be of no avail in any aspect, because contrary to law. Estoppel cannot rest on an illegal contract. * * * The regulation by Congress of interstate commerce rates takes that subject out of the realm of ordinary contract in some respects, and places it upon the rigidity of a quasi statutory enactment. The public policy thus declared supersedes the ordinary doctrine of estoppel so far as that would interfere with the accomplishment of the dominant purpose of the act. It does not permit that the inequality of rates to arise indirectly through the application of estoppel, which it was the aim of the act to suppress directly.' "

In *Louisville & N. R. Co.* v. *McMullen*, 59 So. 683, it is said:

"Of course, the rule that where one, with full knowledge of all the facts, accepts in payment of a debt a less amount than the sum actually due him, he will not be permitted afterwards to claim the balance not paid, is familiar. The rule that money voluntarily paid, with full knowledge of all the facts, cannot be recovered back, is also familiar, as is that other rule that when an illegal contract is executed, and the parties are in pari delicto, the law will not interfere be-

tween them. It is, however, evident that it is the purpose of the federal courts, into whose keeping the Interstate Commerce Law is peculiarly committed, because it is a federal law and covers matters resting peculiarly within the police powers of the federal government, to refuse to permit the oversights, the blunders, or mistakes of the clerks or agents of those engaged in interstate commerce, upon the above ground, to preclude the carrier from collecting, in case of underpayment, the actual amount due on an interstate shipment, or the shipper or consignee, in case of overpayment, from the collection of the amount overpaid."

13 Corpus Juris Secundum, page 873:

"Under the Interstate Commerce Act, a carrier has both a right and an absolute duty to recover the scheduled rates, regardless of its contract."

The Law Wrote the Minimum Price Into the Contract

The contract that existed between October 1, 1940 and March 23, 1941, and which was created by the exchange of letters respectively dated February 27, 1940 and February 29, 1940, embodied the memorandum of agreement entered into March 20, 1933 (R., p. 24) as changed by the letter dated December 2, 1939 (R., p. 30) and subsequent performance thereunder.

It is to be noted that this original agreement provided that "said price * * * shall be subject to any change authorized by the government," and in construing the contract, consideration should be given to the fact that a change was not only authorized by the government, but that a change was required by the government when it established minimum prices.

The 1940 contract was entered into after the enactment of the Bituminous Coal Act, but, regardless of the provision of the 1933 contract quoted above which was carried

into the 1940 contract as noted above, the Petitioner and the Respondent were charged, when they contracted, with the knowledge that the contract was subject to regulation by the government and that any price they might agree on would be subject to change by the government, inasmuch as the government had signified its intention of regulating coal prices when it enacted the Bituminous Coal Act in 1937.

The sale of coal was held to be commerce in the *Sunshine* case, and subject to regulation by Congress. The power of Congress to regulate commerce, as stated in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 Fed. (2d) 943, is paramount to whatever may be agreed between the parties.

Respectfully submitted,

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